**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**REGION 01**

**MAINE COAST REGIONAL HEALTH FACILITIES,**
**d/b/a MAINE COAST MEMORIAL HOSPITAL,**
**THE SOLE MEMBER OF WHICH IS**
**EASTERN MAINE HEALTHCARE SYSTEMS**[1]

**and** **Cases 01-CA-209105**
**01-CA-212276**

**KAREN-JO YOUNG, an Individual**

## CLOSING ARGUMENT OF RESPONDENT WITH PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

### STATEMENT OF THE CASE

This case was tried in Bangor, Maine, on July 17 and 18, 2018. A charge was served on Respondent on November 2, 2017, and an amended charge was served on June 19, 2018, in Case 01-CA-209105. The charge in Case 01-CA-212276 was served on Respondent on December 29, 2017. The Acting Regional Director for Region 1 of the National Labor Relations Board ("NLRB" or "Board") issued the amended consolidated complaint and notice of hearing on June 20, 2018 (the "Complaint").

The Complaint alleges that Respondent: (a) violated Section 8(a)(1) of the National Labor Relations Act (the "NLRA" or the "Act") by terminating the employment of Karen-Jo Young ("Ms. Young") in retaliation for her having engaged in "concerted protected activity" and for her having "assisted" the Maine State Nurses Association/National Nurses Organizing Committee/National Nurses United (the "Union") (Complaint ¶¶ 11 & 12); (b) violated Section 8(a)(3) by discriminating against Young for her having "assisted" the Union, thereby

[1] After close of the evidence the parties stipulated to amend the name of Respondent in the Amended Consolidated Complaint to be "Maine Coast Regional Health Facilities, d/b/a Maine Coast Memorial Hospital, the sole member of which is Eastern Maine Healthcare Systems." Transcript ("Tr.") at p. 409.

"discouraging membership" in the Union (Complaint ¶ 12); and (c) violated Section 8(a)(1) by maintaining an "overly broad" News Release, External Publication and Media Contact policy in effect when Young was fired (the "Policy"), and by maintaining the Policy as amended thereafter (the "Amended Policy"), which is alleged still to be unlawfully overbroad. Tr. 20. Respondent filed a timely answer in which it denied committing any violation of the Act.

## PROPOSED FINDINGS OF FACT[2]

### I. JURISDICTION

Respondent admitted in its Answer that in conducting its operations it derives gross revenues in excess of $250,000, and that it purchases and receives, at its Ellsworth, Maine, facility, goods valued in excess of $5,000 directly from points outside the State of Maine. Answer ¶ 3.[3]

### II. ALLEGED UNFAIR LABOR PRACTICES

#### A. RESPONDENT

Respondent is a Maine, public benefit, nonprofit corporation, exempt from federal income tax under IRC § 501(c)(3), that owns and operates a medium-sized hospital in Ellsworth, Maine. Tr. 162; Joint Exhibit Number ("J. Exh.") 3 & J. Exh. 4. Its stated purposes include the furtherance of "preventive medicine, rehabilitation, and the public health and welfare," and the furtherance "in every practical manner general improvement in rural medical care." J. Exh. 4 (Article THIRD of the Restated Articles of Incorporation of Maine Coast Regional Health Facilities).

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[2] Unless otherwise noted, these proposed findings of fact are taken from uncontradicted testimony and evidence in the record.

[3] The Complaint alleged $5,000 of inflow purchases.

Respondent employs over 500 people and is the largest employer in the community. Tr. 165-66. As such, Respondent plays a vital role in the community, not just as the most important local healthcare provider, but as an economic engine for Ellsworth and the small towns around it, providing jobs and opportunities for families to live, grow, and stay in Maine. *Id.*

Like many rural hospitals, however, Respondent faced very difficult economic problems. Tr. 162, 164. From 2010 through 2016, the Hospital incurred heavy operating losses that worsened every year, except for 2011 when the State of Maine paid a one-time settlement of moneys owed to many Maine hospitals. *Id.* Faced with the prospect of going under, Respondent in 2015 turned to and affiliated with Eastern Maine Healthcare Systems ("EMHS"). Tr. 162. EMHS is a larger Maine nonprofit corporation, also affiliated with eight other hospitals in Maine. Tr. 201-02. EMHS provides its member hospitals with certain centralized administrative functions and services, such as accounting, patient billing, legal services, and some human resources management services. Tr. 198-99.

As a Maine nonprofit corporation, Respondent issues no stock and has no shareholders. 13-B M.R.S. § 407 ("Shares of stock and dividends prohibited"); *see generally* 13-B M.R.S. §§ 101 *et seq.* (the "Maine Nonprofit Corporation Act"). Some, but by no means all, Maine nonprofit corporations have what are called "members." 13-B M.R.S. § 402. If a Maine nonprofit corporation has one or more members, the manner of appointment, qualifications, and rights of the member or members must be set forth in its articles of incorporation. *Id.*

Maine nonprofit corporations are managed by their boards of directors. 13-B M.R.S. §§ 701 *et seq.* Directors are elected or appointed in the manner provided in the articles of incorporation. 13-B M.R.S. § 702(2). Many Maine nonprofit corporations refer to their

directors as "Trustees," as does Respondent. J. Exh. 4 (Article FOURTH of the Restated Articles of Incorporation of Maine Coast Regional Health Facilities).

When Respondent became affiliated with non-party EMHS in 2015, Respondent did so by filing Restated Articles of Incorporation on October 1, 2015. J. Exh. 3. As of that date, Respondent was reorganized to have two corporate members, one of which was EMHS, referred to as the "Class B Member," and one of which was Maine Coast Healthcare Corporation ("MCHC"), also a Maine nonprofit corporation. J. Exh. 3 (Article FIFTH of the Restated Articles of Incorporation of Maine Coast Regional Health Facilities). MCHC retained no voting rights concerning the management of Respondent.

The voting rights of EMHS, referred to as "Joint Initiatory Powers," were set forth in an Appendix to Respondent's Restated Articles of Incorporation. In exercising any of its voting rights, EMHS was required, first, to consult with Respondent, and, in any case, to "further the goal of developing and strengthening patient care services within the health system operated by EMHS for the benefit of patients within the [Respondent's] service area." J. Exh. 3 (Appendix 1). Although in this process Respondent's local Trustees also retained Initiatory Powers of their own, these powers were ultimately made subject to EMHS's own board's approval (or, if authorized through delegation by that board, the approval of EMHS's CEO).

Later, upon the filing by Respondent on November 21, 2017, of new Restated Articles of Incorporation, MCHC ceased being a member of Respondent, and EMHS became the sole member of Respondent, retaining exactly the same Joint Initiatory Powers previously conferred upon EMHS back in October of 2015. J Exh. 4. The parties accordingly stipulated as follows:

> Eastern Maine Healthcare Systems, by amendments to the Articles of Incorporation of Maine Coast Regional Health Facilities, doing business as Maine Coast Memorial Hospital, became the sole member of Maine Coast Regional Healthcare Facilities, doing business as Maine Coast Memorial

> Hospital, and was granted initiatory powers as set forth in the amendments. In summary, the effect of this change was that Eastern Maine Healthcare Systems became the nonprofit equivalent of corporate parent of Maine Coast Regional Health Facilities, doing business as Maine Coast Memorial Hospital.

Tr. 410-11.

As previously indicated, prior to its affiliation with EMHS, Respondent was headed toward financial ruin, with operating losses approaching $7 million annually, projected to be significantly even worse for the fiscal year ending in September of 2017. Tr. 164. There was genuine doubt that a hospital was still economically viable in Ellsworth, despite its importance in the community. *Id.*[4]

That is when, starting in 2017, Respondent, working with EMHS representatives, "[r]olled up [its] sleeves and started at it." *Id.* Respondent's highest level executives literally worked seven days a week, with its President usually leaving home about 6:00 AM and returning home late at night. Tr. 166. Other than regular holidays, management took little or no vacation. *Id.* Every single one of Respondent's contracts was scrutinized, including supply contracts, employment contracts, and lease agreements. Tr. 168. Physician contracts were reopened and redone. *Id.* And then, for the first time in over seven years, for the three to four months heading into the fall of 2017, Respondent operated at a profit—not a loss. Tr. 167. It looked like Respondent's affiliation with EMHS and the extraordinary efforts of its managers were paying

[4] People tend to think that what looks to them from the outside as a thriving hospital filled with patients, doctors, nurses, and so forth, cannot be losing money and going bankrupt. Hospitals in deep financial distress seldom advertise that fact. The truth is, however, that during this time, Respondent was not the only mid-sized, independent hospital in Maine facing economic ruin. *See* **Exhibit A**, attached (copy off PACER of bankruptcy filing on June 16, 2015, by Parkview Adventist Medical Center of Brunswick, Maine). *Gent v. Cuna Mut. Ins. Society*, 611 F.3d 79, 84 n.5 (1st Cir. 2010) (courts may take judicial notice of information in official federal websites even if such information is not otherwise in the record).

off, that Respondent was turning the corner, and that Respondent could be a viable concern in rural Ellsworth after all. Tr. 167, 175.

Moreover, Respondent's healthcare services to the community suffered naught by these fiscal measures leading into the fall of 2017. On the contrary, in December of 2017, the Centers for Medicare & Medicaid Services ("CMS") awarded Respondent an overall hospital rating of 5 out of 5 stars, which is the highest possible rating and one that only 7.36% of all hospitals nationwide received.[5] *See* **Exhibit B** attached hereto.[6] John Ronan, the President of Respondent (Tr. 195), testified this was the second time Respondent received 5 stars from CMS, making Respondent the only hospital in Maine ever to do so twice. Tr. 179. The Leapfrog Group, a private nonprofit organization that also collects and analyzes data from hospitals on safety and quality, also gave Respondent its very highest rating in 2017. Tr. 179.

B. RELATIONS BETWEEN THE UNION AND RESPONDENT

The Union has for decades represented nurses employed by Respondent and more recently, since November of 2017, a separate bargaining unit of tech employees. Tr. 138.[7]

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[5] CMS is the federal agency within the United States Department of Health and Human Services that administers the Medicare program. Each year, CMS collects data from thousands of hospitals across the country; this data summarizes up to 57 quality measures across 7 areas of quality. CMS then uses that data to derive an overall rating (based upon statistical modeling and weighted averaging). CMS then, in turn, publishes those hospital ratings. *See* **Exhibit B,** *infra* at fn. 6.

[6] The ALJ and Board may take judicial notice of the information contained in the screen shots attached as **Exhibit B** from the CMS official website, as did the U.S. Court of Appeals for the First Circuit with respect to information from the Center for Disease Control and Prevention ("CDC") official website. *Gent v. Cuna Mut. Ins. Society*, 611 F.3d 79, 84 n.5 (1st Cir. 2010) (courts may take judicial notice of information in official federal websites even if such information is not otherwise in the record).

[7] The tech employees and their separate bargaining unit (which does not include LPN's or CAN's, *see* Tr. 326-327) are not involved in the circumstances of this proceeding. References to the "Union" hereinafter shall mean the Union as representing the nurses' bargaining unit and not

Ms. Young's position is not and was never part of either bargaining unit. Tr. 144. Respondent maintained good relations with the nurses and with the Union both before and after affiliation with EMHS. Tr. 169. Management would meet regularly, informally, with representatives of the Union to discuss any issues about which they had concerns. Tr. 169-70; 332.

One of the subjects of the nurses' last round of collective bargaining was staffing. Tr. 150. Specific provisions on staffing were negotiated and agreed-upon in the CBA effective May 21, 2016. Tr. 142, 150. At none of the regular, informal meetings between the Union and Respondent before their meeting on August 28, 2017 (the meeting when the nurses presented their petition raising staffing concerns (hereinafter the "Petition" (Tr. 154)), had the nurses expressed concerns about staffing, much less concerns that Respondent was violating the staffing rules that had been effective since May of 2016. Tr. 333. The Union had not threatened to file and had not filed any grievance on the subject. Tr. 157, 170, 221, 332-33. Nor had the nurses or the Union followed any other "internal procedures for voicing concerns in the grievance process." Nor, ipso facto, had Respondent ignored these concerns.[8]

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the tech employees. That being said, it is safe to say that had there been the slightest exhibition of anti-union animus by Respondent during unionization of the tech employees in November of 2017, the General Counsel would have seized upon and elicited testimony to that effect from Todd Ricker, the lead Union representative in Maine (Tr. 137), since such evidence might have helped to bolster a case under Section 8(a)(3) that termination of Ms. Young occurred in a general milieu of distrust or animosity toward the Union. Tr. 137. No such evidence was offered. The ALJ may therefore fairly infer that Respondent has not displayed any antipathy toward the Union, or any propensity to discourage membership in the Union, literally for decades, leading up to events with Ms. Young. The General Counsel nonetheless urges the ALJ to find that Ms. Young's termination was a sudden, singular eruption of antiunion retaliation, to punish Ms. Young for applauding in her letter to the editor what she perceived as Union efforts, but no facts support such a finding. It is implausible that Respondent, after decades of direct and positive relations with the Union, would suddenly try to deal an underhanded, indirect, blow against the Union by firing Ms. Young.

[8] The business agent for the Union, Mr. Ricker, testified that to his knowledge no grievance was ever filed. Tr. 157. Mr. Ronan testified there was none. Tr. 221. Both Mr. Ronan and Mr.

Against this backdrop, suddenly and without warning at one of Respondent's regular, informal meetings with the nurses, the nurses, with Mr. Ricker in tow, presented a Petition (hereinafter the "Petition") on staffing concerns to Respondent on August 28, 2017. Tr. 154; GC Exh. 16. Management was stunned since they were unaware of such concerns from the nurses, much less as seriously stated in the Petition. Tr. 171, 224, 264, 333. Mr. Ronan, for example, knew there were job openings for more nurses, which Respondent was trying to fill and for which it had been bringing in temporary travelling nurses. Tr. 171. Respondent had not previously cut a single nurse position for at least as long as Mr. Ronan had begun acting as president in the fall of 2016. Tr. 163, 171-72. The unfilled nursing positions were a function of circumstances facing hospitals across the nation, not peculiar to Ellsworth, Maine. Tr. 171-72.

After the nurses presented the Petition, Mr. Ronan investigated and was satisfied that, contrary to what was implied by the Petition, Respondent was complying with the CBA on the subject of the staffing of nurses. Tr. 164. Neither Mr. Ronan nor anyone else on behalf of

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Lundy testified the August 28, 2017, Petition raising staffing concerns caught them by complete surprise. Tr. 171, 224, 264, 333. Mr. Ricker gamely tried to spin things as though staffing had been an "ongoing" issue. Tr. 157-59. But his actual testimony was only that he knew staffing had been an issue before he began working for the Union in 2014 (Tr. 137, 158 (lines 19-25)) and that it was the subject of negotiated provisions in the CBA effective May 21, 2016 (Tr. 159, 149-50). Other than that, he irritably disavowed any personal knowledge of the subject. Tr. 158. The only rational inference, therefore, is that Mr. Ronan and Mr. Lundy were correct that prior to the nurses "going public" with the Petition, the Union had not raised the issue formally or informally with management since at least May of 2016, when the last CBA took effect. Therefore, also, contrary to what Ms. Young wrote in her September 17, 2017, letter to the editor, the nurses had not "followed the proper internal procedures for voicing their concerns in the grievance process" before "going public" with their Petition. General Counsel Exhibit Number ("GC Exh.") 10. Ms. Young herself admitted that she had no personal knowledge about what the nurses had or had not done, and she was only parroting what she thought she read in a previous newspaper article. Tr. 52-53. The fact that staffing levels had not been a live, ongoing issue since at least 16 months prior to Ms. Young's letter to the editor published in September of 2017, and the fact that after presenting their Petition in August of 2017, the Union never raised the staffing issue again (Tr. 264, 333-34), together mean, among other things, that Ms. Young was not taking part in "ongoing Union activity" when she said in her letter to the editor that she "applauded" the nurses' Petition.

management responded to the allegations in the Petition. Tr. 264, 333-34. Neither did the nurses nor the Union ever raise the issue again. Tr. 264, 333-34. The Union staffing concerns in the Petition, which were also publicized by the Union immediately thereafter in a local newspaper story (GC Exh. 5), came out of the blue and vanished just as quickly. The evidence suggests that the Petition was more or less just a publicity stunt, a "one-shot deal." In any event, there is no evidence that the Petition engendered in Respondent any animosity or desire to retaliate, or that the Petition was part of any ongoing Union activity.

## C. THE POLICY AND THE AMENDED POLICY

EMHS maintains many policies—more than 200—applicable to employees of its affiliated hospitals. Tr. 205, 212-13. One such policy is the Policy involved in this case. The Policy was authored by Suzanne Spruce, Chief Communications Officer of EMHS. J. Exh. 1; Tr. 383. The Policy was in place at EMHS since at least February 25, 2014, before Respondent affiliated with EMHS, and was in place when Respondent terminated the employment of Ms. Young. J Exh. 1; Tr. 210, 383. The purpose of the Policy is to protect and promote the brand and reputation of Respondent in the community by letting the community know that it can trust Respondent to provide safe, quality healthcare services. Tr. 384-85, 391. The purpose of the Policy is also to provide a safety net for employees if cornered directly by a reporter asking questions that the employee is not comfortable answering, often due to privacy or other concerns. Tr. 386-87. In those cases the employee can fall back on the Policy and indicate to the reporter that he or she cannot answer for Respondent.[9]

[9] EMHS puts draft policies and amendments through an extensive review process involving its compliance and legal departments as well as senior leadership before they are adopted. Tr. 384.

The Policy states as follows:

> All news releases, media contacts, outreach, and externally directed publications (including brochures, newsletters, and the website) relating to EMHS and its member organizations shall be generated by those organizations' respective Community Relations/Marketing Departments or by EMHS Community Relations. When appropriate, member organization CR departments should work with EMHS Community Relations to coordinate standardized EMHS-wide releases.
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> All such materials will follow a prescribed and appropriate review process, including circulation prior to publication among appropriate executives based on content and member organization.
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> Releases or publications relating to the provision of clinical care at an EMHS member organization will be reviewed by and subject to the approval of the chief medical or nursing executive prior to publication.
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> Final approval must be secured from the CEO or Sr. VP of the member organization featured, or from the Chief Communications Officer or EMHS vice president responsible for public information. In the event of an emergency, the process may be abbreviated as appropriate.
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> No EMHS employee may contact or release to news media information about EMHS, its member organizations or their subsidiaries without the direct involvement of the EMHS Community Relations Department or of the chief operating officer responsible for that organization. Any employee receiving an inquiry from the media will direct that inquiry to the EMHS Community Relations Department, or Community Relations staff at that organization for appropriate handling.

J Exh. 1.

No evidence remotely supports an inference that, over the long life of this Policy applied throughout the EMHS system, the Policy was ever once intended or applied to discourage, or ever had the effect of discouraging, the organization of workers or their membership in a union. No evidence remotely supports an inference that, over the long life of this Policy as applied throughout the entire EMHS system, the Policy was ever once intended or applied to interfere with, or ever had the effect of interfering with, concerted activities of workers for their mutual aid or protection—unless the General Counsel is correct in this *sui generis* circumstance that Ms.

Young engaged in concerted activity with coworkers for their mutual aid and protection, for which she was fired. The evidence, instead, is that the Policy had never been applied previously to an employee, much less in a manner suggestive of something touching on the concerns of Section 7 of the Act or with any design to chill workers' rights. Tr. 246-47, 343-44, 393-397.[10] So, for example, management would never have thought that the Policy was in play when Union representatives delivering the Petition made statements critical of Respondent for publication in the Ellsworth American[11] without clearance from EMHS Community Relations or the COO of Respondent. GC Exh. 5 (September 2, 2017, article in the Ellsworth American "MCMH nurses cite staffing in petition); Tr. 393-397.

The Policy was amended and replaced by the Amended Policy, effective January 15, 2018. J. Exh. 2. The Amended Policy was promulgated by EMHS to its member organizations, including Respondent, and Respondent, as is the custom in such circumstances, notified its employees that the Policy had been amended, instructed employees to review the change, and made itself available if any employee had questions or concerns about it. Tr. 287, 290-91, 293-94. The Policy was amended by adding the following language:

> **EXCEPTIONS**
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> This Policy does not apply to communications by employees, not made on behalf of EMHS or a Member Organization, concerning a labor dispute or other concerted communications for the purpose of mutual aid or protection protected by the National Labor Relations Act.

[10] The parties actually stipulated that the Ms. Young was the one and only employee of Respondent, or of any other EMHS organization, who was ever disciplined or discharged for violating the Policy. Tr. 8.

[11] The Ellsworth American is the local newspaper in Respondent's rural community, and comes out once a week in both an on-line and an in-print edition. Tr. 34.

J Exh. 2 (emphasis in original). The amendment did not make any substantive change in the Policy. Tr. 393. The Amended Policy (as is plain and unambiguous on its face), like the Policy before it, was never intended to interfere with any rights of workers protected under the Act. Tr. 397-98. Furthermore, any application of the Amended Policy to communications protected by Section 7 of the Act would contravene the express terms of the Amended Policy. Tr. 397-98.

## D. MS. YOUNG—GENERALLY

Ms. Young worked for Respondent for over thirteen years. Tr. 25. During that time she was employed in a part-time, 28-hour a week position, referred to as a "swing-bed activities coordinator." Tr. 26, 27. Her job was to elicit information from patients about their likes and dislikes, and their interests and hobbies, in order to coordinate and provide them with diversions and activities, if they so desired, designed to improve their quality of stay, such as reading materials, puzzles, word search games, card or board games, or other ways to socialize and pass the time. Tr. 27-29. Ms. Young also helped by escorting patients to the bathroom[12] or accompanying them for short walks, their conditions permitting, or by walking behind professional therapists with their patients who needed oxygen tanks and IV poles, while the therapists provided those patients with prescribed ambulatory therapy. Tr. 33, 282-82, 295-96. Ms. Young also answered call lights, not to provide skilled nursing services, but to identify the patient's needs, or perceived needs, and pass that information along to the appropriate professional or professionals. Tr. 30, 281-82, 297, 299.

Since 2015, Ms. Young's position as the swing-bed activities coordinator was in the physical rehabilitation department. Tr. 27, 83-84. Ms. Young was not a member of the Union or in any other bargaining unit. Tr. 144. She was not in the nursing department line of reporting,

[12] While Ms. Young may have escorted patients to the bathroom, she was not supposed to aid them in toileting. Tr. 282 (she was not supposed to be toileting patients); *id.* 284 (she did not provide "skilled care" to patients).

nor were there any nurses -- or even CNAs, who are not bargaining unit members -- employed in the rehabilitation department. Tr. 83; Tr. 279. On a day-to-day basis, although to a limited extent she would lend a hand to nurses if and when they asked, she reported to and received her work assignments from both the clinical supervisor of physical therapy and the clinical supervisor of occupational therapy. Tr. 278.

In performing her duties, Ms. Young undoubtedly communicated at times with, and had to communicate with, nurses, physical therapists, and doctors. Tr. 30-32, 48-49. There is no evidence, however, that any nurse or the Union asked Ms. Young for her input or to assist them in any way concerning their wages or any term or condition of employment, or that they discussed such issues with her. There is no evidence that any doctor discussed any term or condition of his or her contract with Ms. Young, much less asked for her input or assistance concerning any term or condition of employment. Ms. Young herself admitted that she had never spoken with any doctors about the contract issue, and admitted that the only thing she knew about the situation is what she had read in the local newspaper. Tr. 101-02. She also admitted that she was not involved in physician recruiting and had no idea what efforts were being made to attract doctors to the hospital. Tr. 113.

There is no evidence that any physical therapist asked Ms. Young for her input or assistance concerning any term or condition of employment. There is no evidence whatsoever that Ms. Young ever: (a) met with any nurse, physician, physical therapist, or the Union, to offer her assistance or thoughts to any of them regarding any of their employment-related concerns; or (b) that any of them spoke with her about their employment-related concerns; or (c) that she informed any of them of any intent to assist them; or (d) that she communicated to any of them any desire or plans to engage in concerted activities with them for their mutual aid and

protection. Furthermore, even if the nurses' Petition delivered by the Union to Respondent on August 28, 2017, described above, had been part of an ongoing collective campaign on the issue of staffing, and not just (as it was) a one-shot deal, there is no evidence that Ms. Young was involved in the conception, generation, drafting, or delivery of the Petition, or that Ms. Young even knew about it, apart from what she read of it (or imagined that she had read of it) afterwards in the local newspaper. Tr. 105-06 (Ms. Young testified that when she wrote her letter to the editor, she had never seen the Petition and all she knew about it came from what she had read previously in the local newspaper), 112 (Ms. Young testified that she was not involved in recruiting nurses and did not know what efforts were being made other than periodically seeing vacant positions being posted in the classifieds).

## E. MS. YOUNG'S LETTER TO THE EDITOR

In the privacy of her own home, Ms. Young can fairly be said to have obsessed over a series of drafts of letters written by her to the editor of the Ellsworth American (the "Newspaper"), only the final draft of which she desired to publish (such final draft hereinafter referred to as the "Letter"). GC Exh. 9 ("Please discard the previous ones and consider only this one for publication . . . this is the only one I want considered for publication"), Tr. 56-58, 60-61. Ms. Young admitted that she never consulted or discussed with any of her coworkers the various drafts of the letter to the editor that she had prepared and submitted to the Newspaper. Tr. 99-100 (answering "That's correct" in response to "And at no point in that writing of it [the three drafts of the letter] did you consult with any other employees at Maine Coast, although you might have consulted with your husband, I think you said, at one point; is that right?").

When asked why she wanted the Letter published, Ms. Young used the grammar of a third-party observer and testified: (a) about the tensions between unions and managements

generally, "whether they're teachers or nurses or whatever"; and (b) that she wanted to correct a previous editorial in the Newspaper by clarifying that based on what she read in the Newspaper's article about the Petition (GC Exh. 5), her understanding was that Respondent's nurses were concerned about patient safety, not wages. Tr. 62-63. Ms. Young frankly admitted that when she wrote her Letter, she had never seen the Petition and all she knew about the Petition came from what she read in the Newspaper. Tr. 105-06.

When asked why she chose the Newspaper as the way to express her views, she explained that she wrote her Letter to the editor of the Newspaper because she wanted to respond to prior articles and a recent editorial she read in the Newspaper. Tr. 63-64. Accordingly, there is no evidence that she was trying to initiate, induce, or prepare for group action in the workplace to better the terms and conditions of anyone's employment, let alone hers. Ms. Young said only how she wanted "to add her voice" in the forum of the Newspaper "to validate" to the community at large (***not*** to Respondent or to coworkers) that she thought what the nurses said in the Newspaper about patient safety was true. Tr. 64. It did not even cross Ms. Young's mind to talk with coworkers about it, much less is there any inkling that, as an end result of her message to the community, she intended or contemplated any form of group activity for the benefit of herself or other workers at the hospital. Tr. 99-100 (Ms. Young admitting that she never discussed her letter with any of her coworkers).

In addition to "adding her voice" on the issue of patient safety, Ms. Young complains in her Letter that there is "unrest, uncertainty, and concern" among the community, patients, and staff as a result of many "frustrated" doctors leaving the hospital, thereby "driving costs up further" due to the use of "expensive temporary locums." GC Exh. 10. Ms. Young does not refer here to any issues of wages or to any terms or conditions of employment that supposedly

frustrated the doctors. Instead, she readily admitted that, in fact, she knew nothing at this point about the situation of doctors at the hospital except for what she had read in the Newspaper, including nothing about recruiting efforts to attract both doctors and nurses. Tr. 101-02, 111-13. Again, there is no evidence that she intended as an end result of her complaint any group activity for the benefit of herself or others in her workplace. Ms. Young even confirmed in her testimony that she thought her letter, if published, would be ignored. Tr. 115.

Ms. Young also devotes two paragraphs in her Letter to castigating Respondent's Board Chairwoman for what Ms. Young perceives as, in effect, treason, by the Chairwoman's supposed disloyalty to Respondent's community in the form of cooperation with the designs of EMHS. These barbs have nothing to do with the terms and conditions of employment. They are also unfair to the Chairwoman[13] and objectively invalid since, contrary to Ms. Young's condemnation of the Chairwoman and EMHS, Respondent, through its affiliation with EMHS, had finally just turned the corner financially all the while maintaining the very highest level of healthcare service to the community. *See* Part II.A, above.

Ms. Young also ridiculed Respondent's executives for "going to their meetings," having "meeting after meeting," and staying "in their offices," instead of venturing out to see what is happening and listening to the people in the trenches "who are actually caring for patients." Ms. Young thereby portrays Respondent's executives as modern day equivalents of Nero fiddling while Rome burned: ineffectual, uncaring, and absorbed in trifles while the enterprise suffered. This too was unfair and objectively invalid given the extraordinary efforts and success of

[13] Mr. Ronan's testimony that this "was an unfair characterization" was particularly evocative when he described the Chairwoman, "Debbie," as being a local business owner who took her job seriously with a lot of pride in the work done by Respondent's Board. Tr. 182.

management in turning Respondent around financially while maintaining the highest level of service. *See* Part II.A, above.[14]

Lastly, Ms. Young falsely stated in her Letter that prior to presenting their Petition, the nurses had "followed the proper internal procedures for voicing their concerns in the grievance process," only to be ignored by management. *See* discussion & note 8, above (nurses did not raise staffing concerns formally or informally for at least 15 months prior to the Petition). This too was speculation—she had no information on what the nurses had actually done or not done.

The Letter is thus filled with uninformed and unfair insults and objectively invalid information harmful to the hospital. Tr. 114-15 (Ms. Young admitting that if people have concerns about the safety of a hospital, that can be very harmful to the hospital). Ms. Young was speaking to what she perceived as "the community," not to coworkers or management, and she thought the Letter would be ignored by the Hospital—much less did she write as part of any design aimed at group action for the mutual aid and protection of workers.[15]

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[14] Mr. Ronan aptly described reading the Letter as causing him to feel like he had been punched in the gut. Tr. 181. Anyone in his position of knowing what was truly happening with finances, doctors, staffing, and the continuing high quality of care, would have been offended, and Mr. Ronan admitted as much. Tr. 189. Anyone knowing the true facts would have also been frustrated and fearful knowing also that just this sort of ignorant publication could cause true harm to Respondent given its recent, but at that time still fragile economic rebirth. Tr. 172-73 (explaining how false reporting can have a ripple effect, including on donors); 177 (explaining the stark reality that if people in the community perceive a hospital as unsafe, that can mean financial ruin).

[15] Ms. Young seemed unconcerned about the likely harmful impact of the Letter on the community's faith in the hospital. She admitted—which is common sense—that if people fear a hospital is unsafe they will try not to go there unless they are "desperate." Tr. 114-15. Yet Ms. Young seemed oblivious to the fact that her Letter actually said the hospital was maintaining "unsafe staffing levels," and that management didn't care and wasn't doing anything about it. It's almost as though she didn't think people would believe her, or she didn't even believe it herself—as though it was just her move in a literary game being played out in the genre of the Newspaper. After all, despite what she wrote, she said she still chooses to get her care at the hospital—as though she sees no contradiction between that and her Letter. Tr. 115. Mr. Ronan

If in this proceeding it could be found that Ms. Young engaged in any concerted activity with her co-workers for their mutual aid and protection, such a finding would have to be based solely upon the fact of her emailing this Letter to the Newspaper for publication, without encouragement from, consultation with, or the foreknowledge of any other coworker, and without a copy to anyone else. For the reasons stated below, and already implied, Respondent believes by sending this Letter, Ms. Young engaged in no concerted protected activity within the meaning of Section 7 of the Act. A contrary finding would strain the facts and the legal standards beyond their reasonable bounds.

F. RESPONDENT'S RESPONSE TO THE LETTER

The Letter soon came to the attention of Mr. Ronan, who received word of it on the evening of Wednesday, September 20, 2017, but who did not read it until early in the morning of Thursday, September 21, 2017. As stated above, the Letter felt to him like a punch in the gut. Tr. 181. The Letter put the quality of Respondent and of its executives in a very false light, was disrespectful to the hard work of senior and middle-level management, and unfairly derided people like Debbie Ehrlenbach, the Chair of the Board of Respondent. Tr. 181-84. Due to the timing of the Letter amidst the fledgling financial advances of Respondent, Mr. Ronan believed the Letter caused real harm by putting real questions in people's minds about the safety of Respondent's services. Tr. 185. Because Ms. Young published the Letter without the involvement of the EMHS Community Relations Department or Respondent's COO, Mr. Ronan believed she also violated the Policy. Tr. 187. Mr. Ronan soon decided that once there could be no doubt of Ms. Young's authorship of the Letter, that her employment would be terminated. Tr.

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and others who were working countless hours to make and maintain Respondent as a viable concern for the sake of the community did not, like her, have the luxury of not taking the Letter seriously.

187-88. Mr. Ronan decided to discharge Ms. Young because she made uninformed, false, unfair and harmful representations about Respondent and its executives, did not confer with EMHS Community Relations or the COO prior to publication, and because she had a record of some employee discipline. Tr. 188-89, 192. Mr. Ronan testified that even if Ms. Young had not said a word about the nurses or the doctors in her Letter, his action would have been the same. Tr. 189, 192. As he explained:

> beyond the things you asked me to rule out [i.e., her references to the nurses and the frustrated doctors] there's still misrepresentations in this [the Letter] about what was going on at the hospital. And it's [the Letter is] tarnishing our reputation. And to tarnish our reputation and go out and not follow our policies and say things . . . that simply aren't true, I just don't think can be—can be tolerated.

Ms. Young was informed later that day that her employment was terminated and she was summarily escorted from the campus. She was presented with a simple discharge letter stating that her employment was terminated for her having violated the Policy in accordance with Respondent's progressive disciplinary policy. GC Exh. 11.[16]

[16] The record fairly reflects that the fact Ms. Young had been disciplined in the past for unrelated matters played some role in the decision to terminate her employment. At the same time, the reference in Ms. Young's letter of discharge to progressive discipline and her having violated the Policy reflects more the gravity of the manner in which she violated the Policy after having had disciplinary issues in the past, rather than the gravity of the issues in the past. So when the ALJ asked Noah Lundy, the director of human resources for Respondent, basically whether she would have been fired for violating the Policy if the Letter praised instead of criticized Respondent, he admitted that her criticism "probably played a role." Tr. 366. Obviously, as Mr. Ronan testified, her criticism played a large role in Mr. Ronan's decision because the things she wrote were false, unfair, and harmful to the interests of Respondent—and, frankly, irresponsible to toss out there in a small, rural community. Even Ms. Young understood how a loss of trust and respect in the community could be "very harmful" to Respondent. Tr. 115. Thus Respondent is not pretending that termination of Ms. Young's employment was justified due to her technical violation of a media policy that few workers probably even knew about. Instead, termination was appropriate in a system of progressive discipline when the Policy was not just violated as a technicality, but was violated egregiously by an uninformed individual making seriously unfair, false, and harmful public representations about Respondent.

## LEGAL ANALYSIS

### A. THE AMENDED POLICY DOES NOT VIOLATE THE ACT.

The General Counsel argues that Respondent, by merely maintaining the Amended Policy, violates the Act. The General Counsel's argument, suspect under prior standards, is plainly invalid under today's standards. In *The Boeing Company and Society of Professional Engineering Employees in Aerospace, IFPTE Local 2001*, 365 NLRB No. 154, 2017 WL 6403495, the Board expressly overruled the *Lutheran Heritage* "reasonably construe" standard, and stated that it:

> will no longer find unlawful the mere maintenance of facially neutral employment policies, work rules and handbook provisions based on a single inquiry, which made legality turn on whether an employee "would reasonably construe" the rule to prohibit some type of potential Section 7 activity that might (or might not) occur in the future.

*Id.* at *2. The Board explained the many defects inherent in the *Lutheran Heritage* test included how it came to require "linguistic precision" by employers in the drafting of policies, resulting in facially neutral work rules being invalidated solely because they were ambiguous—in "sharp contrast" to the treatment of 'just cause' provisions, benefit plans, and other types of employment documents," and failing "to recognize that many ambiguities are inherent in the NLRA itself." *Id.* at *3. The Board jettisoned the *Lutheran Heritage* test in large part because that test wrongly put the onus on employers to "correctly anticipate and carve out every possible overlap with NLRA coverage." *Id.*

Under the *Boeing* standard, the Board will find a rule lawful to maintain simply if "the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights." *Id.* at *4, *16. The Amended Policy expressly states that it does not apply to "communications by employees, not made on behalf of EMHS or a Member Organization,

concerning a labor dispute or other concerted communications for the purpose of mutual aid or protection protected by the National Labor Relations Act." There is only one reasonable way to interpret this, namely, that the Amended Policy does not prohibit or interfere with the exercise of NLRA rights. Rather than condoning such interference, it would be a violation of the terms of the Amended Policy were it to be applied to interfere with the exercise of NLRA rights. Respondent may therefore lawfully maintain the Amended Policy.[17]

B. MS. YOUNG DID NOT ENGAGE IN CONCERTED ACTIVITY OR UNION ACTIVITY.

The dictionary definition of "concerted" is jointly arranged, planned, or carried out. It is hardly surprising, therefore, that although a single communication made from one worker directed to another worker may qualify as concerted activity, "'to qualify as such, it must appear at the very least that it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees.'" *NLRB v. Hotel Employees and Restaurant Employees Int'l Union Local 26*, 446 F.3d 200, 207 (1st Cir. 2006) (quoting *El Gran Combo de Puerto Rico v. NLRB*, 853 F.2d 996, 1004 (1st Cir. 1988) (quoting *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964)). If so, it is "sufficient that the [complaining] employee intends or contemplates, as an end result, group activity which will also benefit some other employees." *Id.* Thus "when synthesized, the

[17] This conclusion of law follows necessarily from the test set out in *Boeing*. This conclusion is also follows from the rationales for that test set forth by the Board, namely, the goals of simplicity, certainty, and no longer putting the onus on employers, if they have any rules at all, to draft into them long, linguistically precise and thorough exegeses, yet in plain language comprehensible to average workers, of all the rights with which the rule will not interfere. Respondent further recognizes that General Counsel memoranda are not by themselves legally binding authority, but would point out that under the guidance given in Memorandum GC 18-04 (June 6, 2018) ("Memo GC 18-04"), the Amended Policy is unquestionably a lawful, Category 1, rule. In addition, nothing in Memo GC 18-04 indicates that the General Counsel's guidance in it is anything but a fair application of the legal principles that are now binding law for the Board.

relevant precedent from our Court and the Board reflects that the benchmark for determining whether an employee's conduct falls within the broad scope of concerted activity is the intent to induce or effect group action in furtherance of group interests." *MCPC INC. v. NLRB*, 813 F.3d 475, 486 (3d Cir. 2016).[18]

Ms. Young wrote her Letter at home in complete isolation from her coworkers and without any discussion of it or its contents with any coworker. Tr. 99-100. She sent the Letter to the editor of the Newspaper in the form of a "letter to the editor" because she wanted to say something to the community (if it was published) and also to correct in the mind of the editor (even if it was not published) what she perceived as something amiss in his recent editorial. Tr. 100 (Ms. Young agreeing that her local community was her audience for the letter). When she sent her Letter to the editor, Ms. Young was not engaged in any conversation with anyone. She didn't expect a response from the listener. Rather, without the input or knowledge of anyone else, she, on her own, shot off a broadside directed not to any coworker, nor to management, but directed to an editor, and to the community if she got published. In so doing she had no intent to induce or effect any group action in the workplace. Her object was not even slightly to initiate or to prepare for group action. [19]

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[18] The "Court" referred to in this Third Circuit decision is the U.S. Court of Appeals for the Third Circuit. However, this Third Circuit decision, like the two First Circuit decisions cited or quoted above, all expressly rely on the seminal Third Circuit case of *Mushroom Transp. Co.*, 330 F.2d 683. It is therefore fair to say that when "synthesized" this reflects the law in the First Circuit, as well.

[19] If Ms. Young was engaging in any type of concerted activity, she would have talked to coworkers (either at work or somewhere else), given them a copy of what she wrote (either at work or by other means), and/or perhaps posted a copy of what she wrote somewhere in the workplace, or, for that matter, in a public square, so that she would have at least known that her audience would include at least one person other than the editor. Respondent understands that "concerted activity" has been interpreted broadly, but there has to be some common sense limit

The closest Ms. Young comes to "concerted activity" (and likely the only facet in all of this that resulted in this proceeding) is that in her Letter she says:

> I have to applaud the nurses for going public with their valid concerns [in the Petition] of inadequate, unsafe staffing levels. The nurses followed the proper internal procedures for voicing their concerns in the grievance process.

GC Exh. 10. But it would defy logic and common sense to conclude that this sentence transformed her otherwise solitary conduct into group action within the meaning of the Act.

For one thing, as noted above, when Ms. Young wrote the Letter, Ms. Young had never seen the Petition, never discussed it with any nurse or coworker, and had no hand in its conception, preparation, or delivery. Tr. 52-53, 105. All she thought she knew about the Petition was *solely* derived from what she read in the Newspaper. Tr. 105 (Ms. Young answering "Correct" when asked "And what you knew about the nurses' petition, I think you told us, was solely derived from what you read in the newspaper, correct?"). In addition, what Ms. Young wrote was false because it was not "unsafe" at the hospital, and the nurses had not followed any grievance process procedures before or after the Petition. *See* discussions and notes 5 and 8, above.

Rather than taking part in any group activity, the true circumstance of Ms. Young was that of a very indirect, sideline spectator who said in her Letter that she was "applauding" something she thought had happened based on what she read in the Newspaper.[20] Ms. Young no

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to what counts as "concerted." There was nothing concerted about the conduct of Ms. Young. Her conduct was just the opposite of concerted.

[20] Ms. Young used the word "applaud" in the Letter. GC Exh. 10. That was her self-characterization as of the time Respondent took its action. But at trial, after being prepared for her testimony by Counsel for the General Counsel, Ms. Young characterized herself as "adding my voice." Tr. 64. There is a difference. Applauding is what a spectator does who is not in the game. Adding a voice is what one does when one is speaking with others—as in "adding my voice to the movement." In this instance, though, there was no movement for Ms. Young to join because the Petition she applauded, and the ostensibly serious issue it raised, was a one-shot deal

more engaged in concerted activity with coworkers than the undersigned could be said to have engaged in concerted activity with an orchestra, if, after the orchestra performed a new composition for the first and only time, which performance we did not attend, the newspaper reported that the performance included a beautiful, haunting oboe cavatina, to which we responded long after the fact by writing a letter saying we totally applaud the composer's choice of an oboe—when, if we had we been slightly involved in the orchestration, we would have known the composer had actually wanted a clarinet.

Similarly, Ms. Young was not part of the Union and never had been, she had not discussed staffing concerns with the Union or the nurses,[21] she was not involved in the Petition, and she behaved only as an interested observer responding with applause for nurses because she thought, based on what she had read, that they had properly followed an internal grievance procedure, when in fact they had not. And though Ms. Young applauded, she had no intent to induce or effect any group action in her workplace, and she in fact did not induce or effect any group action. Ms. Young's response from her home to newspaper articles and an editorial, by applauding activities in which she herself had no involvement whatsoever, cannot count as "concerted activity" within the meaning of the Act.

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that came out of nowhere and vanished just as quickly. *See* final two paragraphs of Part II.B above. Moreover, the question in this proceeding is whether Ms. Young was engaging in concerted activity when she wrote the Letter—not when she was testifying on cue from Counsel for the General Counsel.

[21] Ms. Young testified that she overheard certified nursing assistants ("CNAs") (who, unlike registered nurses, are not part of any bargaining unit, *see* Tr. 326-27) complain every day they had too many patients to care for. Tr. 49. Ms. Young did not testify that any of the CNAs said this to her, much less that she ever engaged in any conversation with any CNA or RN about staffing, and even less so that any CNA or RN asked her to join them in any group activity, or that she offered to assist. Tr. 49 (no evidence that CNAs or RNs ever discussed staffing issues with Ms. Young, but rather she only (a) overheard CNAs complaining to other CNAs about it, and (b) she had seen post-it notes that nurses had left in the staff lounge, not for Ms. Young but for other nurses, stating which nurses had left and not been replaced).

Nor did Ms. Young's applause count as Union activity. There are instances in which pro-union cheerleading constitutes union activity, for example, when an employee undertakes pro-union cheerleading efforts "in response to the urgings of a representative of the . . . union." *Alma Products Co. and District 2, Local 2-540-1, United Steel, Paper and Forestry, Rubber Manufacturing, Energy, Allied Industrial and Service Workers Int'l Union, AFL-CIO*, 07-CA-89537, JD-56-13, 2013 WL 4140303 (Bogas, ALJ) (employee's display of a slave shirt was protected as union activity because it was part and parcel of pro-union cheerleading efforts that he undertook in response to the urgings of a representative of the international union).

Ms. Young was not responding to the urgings of anyone, but herself. Her cheering for the Union in the Letter was therefore not protected union activity.

Other than her applause, nothing else in the Letter could even in theory count as concerted activity or union activity. For example, Ms. Young's unfair belittlement and insults directed at Respondent's Chairwoman and management, generally, were not undertaken in sync with any coworker, and were not aimed at any group activity to improve working conditions. They were on par with the shots taken at management by the Charging Party in *National Dance Institute—New Mexico, Inc. and Diana M. Orozco-Garrett*, Case 28-CA-157050, JD-(SF)-06-16, 2016 WL 537959, where there was no evidence that other employees shared that view or that other employees would see her insults as benefitting them in any way, and no evidence that the insults were geared toward group action. Likewise, though Ms. Young commented about frustrated doctors, there is also no evidence that she had had any conversation with any doctor about working conditions, or that she had the slightest clue about what the departing doctors had thought was unsatisfactory, or that her letter was geared toward group activity on behalf of doctors. Ms. Young's Letter is thus very much unlike the conversation that counted as concerted

activity in *Lou's Transport Inc. and Tr.K.M.S., Inc., and Michael Hershey and Jeffrey Rose*, Case 07-CA-102517, JD-32-14, 2014 WL 2547549, a case in which the ALJ (Bogas, ALJ) determined there was concerted activity when there truly was a conversation between coworkers amidst group concern over workplace safety.[22]

C. MS. YOUNG DID NOT ENGAGE IN PROTECTED ACTIVITY.

"The 'mutual aid or protection' clause protects employee efforts to 'improve terms and conditions of employment, or otherwise improve their lot as employees.'" *Ampersand Publishing, LLC d/b/a Santa Barbara News—Press v. NLRB*, 702 F.3d 51, 55 (D.C. Cir. 2012) (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978)). Some "'concerted activity bears a less

[22] If, which is not true, Ms. Young's applauding the nurses had been concerted activity in the form of an extension of group efforts in an ongoing labor dispute over staffing levels, Respondent concedes it could count as protected activity—i.e., activity that falls within the "mutual aid and protection" clause of Section 7. *See Valley Hospital Med. Ctr., Inc. and Nevada service Employees Union, Local 1107, Affiliated with Service Employees Int'l Union*, 351 NLRB No. 88, 351 NLRB 1250, 2007 WL 4661202 at *4 (nurses' statements to the media about their own staffing levels and its impact on patient care, made during ongoing labor negotiations over these staffing levels, constituted protected activity under the Act). But the circumstances in this proceeding differ greatly from those in *Valley Hospital*. In *Valley Hospital*, management was alleged to have retaliated against concerted action in the form of a press conference where the Union's chief steward spoke on behalf of the Union on patient safety. Ms. Young was not speaking at the request of or on behalf of the Union. Furthermore, the concerted activity at stake in *Valley Hospital* was undertaken by workers *during ongoing negotiations* over a CBA, which involved, among other issues, the issue of staffing levels about which the workers made statements to the media. This connection to ongoing labor negotiations in *Valley Hospital* meant that this concerted activity was for the "mutual aid and protection" of employees in their efforts to improve terms and conditions of their employment—i.e., this connection to ongoing labor negotiations meant that the activity was also protected as falling within the ambit of the "mutual aid and protection" clause. As set forth above, and as also set forth below in Argument Part C, Ms. Young's letter to the editor did not occur during any ongoing labor negotiations or ongoing labor dispute. So even if Ms. Young had engaged in concerted activity, which she did not, she did not engage in protected activity. And finally, even if Ms. Young had engaged in concerted, protected activity by applauding the nurses—which Respondent denies—there is still an important disputed question of the motive for the challenged employment action: Did Respondent fire Ms. Young for applauding the nurses, or did Respondent fire her for other assertions in the Letter unconnected with any concerted protected activity by her. Thus unlike in *Valley Hospital*, at **4 n.5, the *Wright Line* analysis does apply in this proceeding even if some part of Ms. Young's writing of the Letter constituted concerted protected activity by her.

immediate relationship to employees' interests as employees than other such activity,' and 'at some point the relationship becomes so attenuated that an activity cannot fairly be deemed to come within the "mutual aid or protection" clause.'" *Orchard Park Health Care Ctr., Inc. d/b/a Waters of Orchard Park and Carol Gunnersen*, 341 NLRB No. 93, 342 NLRB 642, 643, 2004 WL 963375 at **3 (quoting *Eastex*, 437 U.S. at 567-68).

As set forth above, Ms. Young undertook no identifiable concerted action with others when she called Respondent's Chairwoman a traitor who was disloyal to the community, and when she lambasted upper executives for going to meetings and hiding in their offices instead of doing anything productive. However, even if there was evidence that her coworkers shared these views, which there is not, or that she penned these views with eye toward group action, which there is not, there is no connection between her insults and an effort to improve any particular aspect of her wages, benefits, or working conditions. Instead, these were just generalized insults and criticisms of managerial policies and behaviors that she perceived as manifesting a traitorous and harmful alliance with EMHS. *Ampersand Publishing*, 702 F.3d at 57 (employee efforts to affect the ultimate direction and managerial policies of a business are beyond the scope of Section 7). Ms. Young's maligning Respondent's Chairwoman and belittling management as ineffectual bureaucrats fiddling while the hospital was burning, do not, therefore, constitute activities that come within the "mutual aid and protection" clause of Section 7.

As set forth above, also, Ms. Young undertook no identifiable concerted action with or on behalf of the doctors. However, even if she had, her complaints that some doctors had left the hospital were aimed at no issue she shared with them. She had no connection to any issue over wages, benefits, or working conditions of doctors who remained, or the improvement of such. Ms. Young says "rewritten [doctor] contracts" are causing unrest (GC Exh. 10), but she

identifies no term of any rewritten contract relating to any wage, benefit, or working condition that she wants to improve—which is understandable, given her frank admission that she was not privy to, and knew nothing about, these contracts. Tr. 99-100, 101-02, 111-13.

As set forth above, also, Ms. Young undertook no identifiable concerted action with "staff" when she wrote that losing doctors is causing "unrest" and "uncertainty" among "staff." GC. Exh. 10. Ms. Young wrote this without consulting with any other employees, and there is no sense in which she wrote this in a collaborative effort with "staff" with an eye toward group action that would or could result in these doctors coming back or result in other doctors staying. Furthermore, doctors returning or other doctors staying to alleviate mere "unrest" and "uncertainty" among staff are matters too diffuse and distant from wages, benefits, and specific working conditions of "staff" to fall within the compass of Section 7. *National Dance Institute—New Mexico, Inc.*, 2016 WL 537959 (employee complaints about the quality of the product for the community too attenuated from wages, hours and other working conditions to fall within the purview of Section 7 when, among other things, they were directed at the ultimate direction and managerial policies of a business without substantive content or value that could assist in furthering a protected cause).

Finally, as set forth above, Ms. Young did not engage in concerted activity with the Union or nurses when she applauded in her Letter what she understood about the Petition based on the article in the Newspaper. In addition, however, Ms. Young's expressed concern to the community about "inadequate, unsafe staffing levels" is not protected activity even if it was concerted—which it was not. The activity of the nurses, through the Union, that resulted in the delivery of the Petition, and their official statements about their own staffing levels and patient safety for publication in the Newspaper, might well have been both concerted and protected

under Section 7, if the Petition and such statements were part of a current, ongoing Union campaign on the issue of staffing. But the Union had not raised the staffing issue since at least May of 2016 when it was settled back then, long before the Petition, and the Union did not pursue the issue further after the Petition. *See Valley Hospital*, 351 NLRB at 1250 (communications by nurses' union to the public about alleged staffing levels and unsafe conditions concerted and protected when made during ongoing labor negotiations over staffing issues). Thus Ms. Young's act of writing about nurse staffing levels and patient safety was not protected, even if it was concerted. Unlike the Union statements made in *Valley Hospital*, Ms. Young's writing was not made in connection with any ongoing labor dispute or labor negotiations. The Petition was an isolated event unaccompanied by any subsequent or recently prior group activity—at least none since May of 2016. This part of Ms. Young's comments related to nurses' working conditions, not hers, and not to her ability to care for patients.

Ms. Young's situation is thus akin to the employees in *Orchard Park* who complained to a government agency hotline about patients' dehydration. *NLRB v. Orchard Park*, 341 NLRB at 643-45, 2004 WL 963375 at **3-**5 (remarking that it is false, generally, that in the health care field all conduct directed toward patient care counts as protected). There, in *Orchard Park*, had the employees complained that their own thirst was making them unable to care for patients, that could have been protected activity. But the employees did not call the hotline because of a perception that their ability to deliver patient care was impaired or imperiled by heat or lack of water. And the employees did not show that using or failing to use the hotline to complain about the heat would have any real or potential impact on their own employment. Thus, while their hotline complaint was admirable, and concerted, it was not protected under Section 7. *Id.* Likewise, Ms. Young was not complaining in her Letter that staffing levels made her unable to

do ***her*** job, and Ms. Young did not show how writing her Letter would have any real or potential impact on ***her own*** employment. In fact, she believed the Letter, if published, would be ignored and thus would have no impact on nursing staffing levels or on her own employment. Tr. 115. So even if Ms. Young's complaints in the Letter about nurse staffing levels and patient safety was concerted activity—which it was not—these complaints, coming from her, were not protected activity.

To summarize, for these reasons and the reasons stated above, Ms. Young engaged in no concerted activity, no protected activity, and no Union activity when she wrote the Letter and sent it to the Newspaper. The ALJ need, therefore, proceed no further in order to conclude that Respondent did not violate Section 8(a)(1) or Section 8(a)(3) by interfering with Ms. Young's exercise of any right of hers under Section 7.

D. RESPONDENT ALSO COULD NOT HAVE VIOLATED SECTION 8(a)(1) OR SECTION 8(a)(3) BECAUSE RESPONDENT FIRED MS. YOUNG FOR REASONS UNRELATED TO HER COMMENTS IN THE LETTER ABOUT DOCTORS OR NURSES

Significant portions of the Letter, in which Ms. Young insults Respondent's Chairwoman for being a traitor and stooge of EMHS, and insults upper management for hiding in their offices and going to an endless series of useless meetings, are unquestionably not the result of concerted protected activity by Ms. Young. While Respondent firmly maintains that what Ms. Young said about the nurses and doctors was also not concerted and not protected within the meaning of Section 7, if the ALJ disagrees, then the ALJ must still determine whether Respondent's motive to fire Ms. Young included her protected, concerted activities undertaken with doctors and/or nurses, or whether Respondent fired Ms. Young for her unprotected, false and unfair invective against Respondent's Chairwoman and its upper executives in the course of violating the Policy.

The Board "applies the *Wright Line* framework to alleged violations of Section 8(a)(1) [and Section 8(a)(3)] that . . . turn on employer motivation." *Gates & Sons Barbeque of Missouri, Inc. and Workers' Organizing Committee, Kansas City*, 361 NLRB No. 46, 361 NLRB 563, 565, 2014 WL 4659312 (Bogas, ALJ); *Rockwell Mining LLC and United Mine Workers of America Int'l Union, AFL-CIO*, 09-CA-206434, JD-37-18, 2018 WL 2683888 (Bogas, ALJ) (*Wright Line* framework applied when employer motivation in dispute in alleged violations of Section 8(a)(1) and 8(a)(3)); *Alma Products Co. and District 2, Local 2-540-1, United Steel, Paper and Forestry, Rubber Manufacturing, Energy, Allied Industrial and Service Workers Int'l Union, AFL-CIO*, 07-CA-89537, JD-56-13, 2013 WL 4140303 at n.11 (Bogas, ALJ) (*Wright Line* does not apply if the motivation of the employer is not in dispute).

Under the *Wright Line* analysis as applied under Section 8(a)(1):

> the General Counsel bears the initial burden of showing that Respondent's decision to take adverse action against an employee was motivated, at least in part, by unlawful considerations. 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), approved in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983). The General Counsel may meet this burden by showing that: (1) the employee engaged in union or other protected activity, (2) the employer knew of such activities, and (3) the employer harbored animosity towards the Union or other protected activity. *ADB Utility Contractors*, 353 NLRB 166, 166-167 (2008), enf. denied on other grounds, 383 Fed. Appx. 594 (8th Cir. 2010); *Intermet Stevensville*, 350 NLRB 1270, 1274-1275 (2007); *Senior Citizens Coordinating Council*, 330 NLRB 1100, 1105 (2000); *Regal Recycling, Inc.*, 329 NLRB 355, 356 (1999). Animus may be inferred from the record as a whole, including timing and disparate treatment. See, *Camaco Lorain Mfg. Plant*, 356 NLRB No. 143, slip op. at 4 (2011). If the General Counsel establishes discriminatory motive, the burden shifts to the employer to demonstrate that it would have taken the same action absent the protected conduct. *ADB Utility*, supra; *Intermet Stevensville*, supra; *Senior Citizens*, supra.

*Gates & Sons Barbeque of Missouri, Inc.*, 361 NLRB at 565-66.

The General Counsel, as set forth above, has failed to show that Ms. Young engaged in union or other concerted protected activity. Assuming otherwise only for the sake of argument,

the General Counsel has also failed to show that Respondent harbored animosity towards the Union or against other protected activity. The record, instead, is that Respondent maintained cordial relations with the Union and no animosity toward other protected activity. *See* generally Part II.B, above.

For example, Respondent representatives were surprised by the Petition (Tr. 171, 224, 264, 333), and undoubtedly disagreed with what Union representatives told the Newspaper for publication about staffing and patient safety. But there is not the slightest evidence in the record that Respondent harbored animosity toward the Union before or after the Petition. Respondent did not criticize the Union as a result of the Petition, nor did Respondent take any action or contemplate the taking of any action against any nurse in connection with the Petition. To be sure, Respondent was concerned about the misleading, false and harmful things said about the hospital in the then-recent flurry of articles and editorials in the Newspaper. Tr. 172-73. Respondent's response, however, was to take positive, productive steps, such as doing employee forums, attending community breakfasts, and attending other small community gatherings to get its message out. Tr. 173-76. There is no evidence that in any of this Respondent even once bashed the Union, tried to discourage union membership, or otherwise showed any antipathy toward the exercise of any Section 7 right. The evidence, instead, is that Respondent, in light of the Petition and the things in the Newspaper, endeavored only to give a positive message to its employees and its community that Respondent was turning the corner financially, Respondent was there to stay, Respondent provided a great place to work, and Respondent was continuing to provide safe and very high quality care. Tr. 174-77. The evidence therefore fails to satisfy the General Counsel's first burden in the *Wright Line* framework to show that Respondent harbored animosity towards the Union or other protected activity.

And, assuming only for the sake of argument that there was evidence in the record that Respondent had harbored animosity towards the Union or towards other protected activity, Respondent has met its burden in the next step of the *Wright Line* framework of proving that it would have taken the same action even absent protected conduct. Mr. Ronan was directly asked if he would have made the same decision to fire Ms. Young even if her letter said nothing about the nurses and doctors. Mr. Ronan answered twice, directly and specifically, that his decision "would have been the same." Tr. 189, 192. He testified that his decision would have been the same if the Letter said nothing about nurses or doctors, for the reason that the Letter was sent out in violation of the Policy and contained unfair invective, misrepresentations about patient safety, and was causing harm to Respondent. Tr. 176-77, 181-85, 188-189, 192.

To summarize, the record is devoid of evidence that Respondent ever showed antipathy toward the Union, or any propensity to discourage membership in the Union, literally for decades (other than, oddly, if the General Counsel is correct, the sudden and singular act of retaliating with an antiunion purpose against Ms. Young for her applauding in her letter to the editor what she perceived as Union efforts). As earlier noted, it is hugely unlikely that Respondent, after decades of direct and positive relations with the Union, would suddenly try to deal an underhanded blow against the Union by firing Ms. Young (who was not even represented by or affiliated with the Union). Furthermore, Respondent is not pretending that the termination of Ms. Young's employment was founded simply upon her technical violation of a media policy that few workers may even have known about. Instead, termination was appropriate in a system of progressive discipline when the Policy was not just violated as a technicality, but was violated egregiously by an uninformed individual making unprotected, seriously unfair, false, and harmful public representations about Respondent.

Respondent respectfully asks the ALJ to conclude that Respondent did not violate Section 8(a)(1) or Section (a)(3) of the Act because: (i) Ms. Young engaged in no concerted activity with any co-worker for mutual aid or protection; (ii) Ms. Young engaged in no Union activity; (iii) there is no evidence that Respondent harbored animosity towards the Union or other protected activity; (iv) Respondent's motive in terminating the employment of Ms. Young was not to interfere with, restrain, or coerce Ms. Young or any other employee in the exercise of Section 7 rights; and (v) Respondent's reason for terminating her employment was that she violated the Policy by sending in a Letter for publication containing unprotected and unfair invective and misrepresentations causing actual harm to Respondent. Tr. 172-73, 176-77, 179, 181 (the Letter caused harm).

Also, the Section 8(a)(3) charge, added as an apparent afterthought by the General Counsel, fails not only because the record does not support a finding of conduct motivated by an antiunion purpose, but also because the record does not support a finding that the conduct of Respondent resulted in the discouragement of union membership. Specifically, as stated in *Southcoast Hospitals Group, Inc. v. NLRB*, 846 F.3d 448, 454 (1st Cir. 2017), proof of both discrimination and "a resulting discouragement of union membership" are necessary conditions to support a claim under Section 8(a)(3). In this case, the General Counsel introduced no evidence at all that the firing of Ms. Young resulted in discouraging any worker from joining the Union. Also as stated in *Southcoast Hospitals*, because Respondent did not engage in conduct "inherently destructive" of union members' rights under Section 7, the Section 8(a)(3) claim must be supported with proof that the alleged discriminatory conduct was motivated by an antiunion purpose. *Id.* Whatever else might have played a role in Respondent's decision to fire

Ms. Young, the record does not support the finding that Respondent was animated by an antiunion purpose when it fired Ms. Young.[23]

## E. THERE IS NO NEED TO ANALYZE UNDER THE *BOEING* REGIMEN WHETHER THE POLICY PRIOR TO AMENDMENT WAS LAWFUL TO MAINTAIN OUTSIDE THE CONTEXT OF ITS APPLICATION IN THE DECISION TO TERMINATE MS. YOUNG'S EMPLOYMENT.

The Policy is no longer in effect. For the reasons stated above, the Amended Policy is plainly lawful to maintain. The evidence in the record proves that Respondent applied the Policy without antiunion animus, and without the motive or effect of interfering with rights protected under Section 7. There is thus no need to decipher whether, outside the context of how the Policy was applied to Ms. Young, was it lawful for Respondent to have generally maintained the Policy.

Nor does the Board's decision in *The Continental Group, Inc.*, 357 NLRB 409 (2011) augur otherwise. There the Board recognized that an employer's discipline of an employee under an overbroad rule could generally fall into one of three categories.

On the one hand, an employee might be disciplined under an overbroad rule for activity that is clearly protected concerted activity within the meaning of Section 7. In such instances,

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[23] Counsel for the General Counsel argues that the *Atlantic Steel* framework should be applied in this proceeding. That argument is incorrect for two reasons. First, as set forth above, if Ms. Young engaged in any concerted protected activity, then determining Respondent's motive in making the decision to fire her is of critical importance under both Section 8(a)(1) and 8(a)(3). Second, the Board does not apply the *Atlantic Steel* framework to communications by employees made to the general public from outside the workplace. *Three D, LLC d/b/a Triple Play Sports Bar And Grille*, 361 NLRB No. 31, 361 NLRB 308, 311, 2014 WL 4182705 at **4-**5. Instead, the Board applies the standards set forth in *Jefferson Standard* and *Linn*. *Id.* Under those standards, even if Ms. Young had engaged in protected activity, she would have lost the protection of the Act. She would have lost the protection because if she engaged in protected activity, it was only slightly so, at the very periphery of what is encompassed by Section 7, and in so doing, she made reckless, uninformed and disparaging statements about patient safety that caused damage to Respondent at a critical and fragile time in its economic turnaround. Tr. 172-73, 176-77, 179, 181.

the employer's discipline is unlawful. *Id.* at 411-12. That is not the case in this proceeding because there was no protected concerted activity, much less clearly protected concerted activity.

On the other hand, there are instances where an employee might be disciplined under an overbroad rule for conduct that is "wholly distinct from activity that falls within the ambit of Section 7." Not surprisingly, the employer may lawfully discipline an employee for this type of conduct. *Id.* at 412. Respondent does not concede the Policy was overbroad under the *Boeing* standards, which are the applicable standards today. Assuming only for the sake of argument, however, that the Policy was overbroad under current law, the evidence establishes that Respondent disciplined Ms. Young for her unfair and false assertions wholly distinct from any conduct falling within the protection of Section 7.

The Board also concluded in *The Continental Group* that "there are situations in which an employer disciplines an employee pursuant to an overbroad rule for conduct that touches the concerns animating Section 7 (e.g., conduct that seeks higher wages) but is not protected by the Act because it is not concerted." *Id.* The Board further clarified that for this type of activity,

> the 'chilling effect' rationale for the *Double Eagle* rule[24] applies to a greater extent when an employee is disciplined for conduct that is 'protected' but not 'concerted.' For this reason, we are convinced that application of the *Double Eagle* rule in such instances is appropriate and necessary to fully effectuate the rights guaranteed by Section 7 of the Act.

*Id.* Thus, *The Continental Group* decision held that discipline under an overbroad rule may be unlawful—even if the employee's conduct did not strictly fall within the rights afforded under Section 7—if the discipline was imposed for activity that was "protected" but not "concerted."

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[24] In the earlier case of *Double Eagle*, 341 NLRB 112 (2004), the Board announced a principle that discipline imposed pursuant to an overbroad rule was *per se* unlawful because of the potential "chilling effects" the rule could have on employees' Section 7 rights (this later became known as the "*Double Eagle* rule"). In *The Continental Group*, the Board refined and narrowed the scope of the *Double Eagle* rule, in recognition of the fact that the rule yielded unworkable and unpredictable results for employees and employers alike.

It is within that context that the Board's reference to activity that "touches the concerns animating Section 7" must be considered. When viewed in the proper context, this aspect of the rule is narrower than what might appear at first blush. An employee cannot avoid discipline under an overbroad rule simply because their conduct was peripherally or tangentially related to some aspect of their employment, because then the exception would swallow the rule. Indeed, virtually anything related to the workplace (and which would therefore warrant disciplinary action) can in some respects be considered to "touch the concerns animating Section 7." There would hardly ever be an instance where discipline under an overbroad rule would be deemed proper. Employers, employees, and even the Board would be left guessing where to draw the line about what conduct "touches the concerns animating Section 7" versus what does not. *The Continental Group* rule can, and should, be read as simply standing for the proposition that such discipline is unlawful only if the employee's conduct would have been "protected" under Section 7, had it also been "concerted." Such an interpretation is entirely in line and consistent with the express purpose of the Board's decision in *The Continental Group*; to provide greater clarity and predictability to all stakeholders about when discipline may be proper under an overbroad rule.[25]

[25] Respondent notes that the foregoing is precisely the interpretation of *The Continental Group* utilized by several of the Board's Administrative Law Judges. *See, e.g., Michigan Bell Telephone Company and AT&T Services, Inc.*, Case No. 07-CA-182505 (N.L.R.B. Div. of Judges, Sept. 27, 2017), 2017 WL 4334532. There, the ALJ noted that "the Board has not precisely defined the conduct falling into this category. However, the Board suggested in *The Continental Group* that it would include activity that was not concerted, ***but was for mutual aid and protection.***" *Id.* (emphasis added). *See also Long Island Association for Aids Care, Inc.*, Case No. 29-CA-149012 (N.L.R.B. Div. of Judges, Aug. 26, 2015), 2015 WL 5047526 (holding that an employee's statements made directly to a supervisor regarding his wages and a request for a raise were "protected, even if not concerted" for purposes of implementing *The Continental Group* framework), *aff'd by Long Island Association for Aids Care, Inc.*, 364 NLRB 28 (2016); *North West Rural Cooperative*, Case No. 18-CA-150605 (N.L.R.B. Div. of Judges, Sept. 28, 2016), 2016 WL 5462097 (stating that *The Continental Group* decision may result in discipline pursuant to an overbroad rule unlawful if the employee's conduct was "protected, but not

Respondent respectfully submits that a broader reading of *The Continental Group* is not consistent with the Act, and should not be applied as current Board law, for the reasons set forth in Member Miscimarra's dissent in *Butler Medical Transport,* 365 NLRB No. 112, slip op. at 9-19 (2017), and because it would be contrary to the policies and objective set forth in the *Boeing* decision. Moreover, assuming, again only for the sake of argument, that the Policy was unlawfully overbroad, the evidence proves that Ms. Young's writing of the Letter was neither concerted nor protected (e.g., she points out in the Letter that wages are not the issue), and furthermore, in whatever sense Ms. Young's Letter was peripherally or tangentially related to "protected" rights, the evidence proves that Respondent disciplined Ms. Young for her unfair, false assertions distinct from what could fall within the ambit of Section 7 protection.[26]

PROPOSED CONCLUSIONS OF LAW

A. Respondent is an employer within the meaning of the Act.

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concerted"); *Greyhound Lines, Inc.*, Case No. 08-CA-181769 (N.L.R.B. Div. of Judges, July 21, 2017), WL3225839 (same).

[26] Noteworthy, also, is that the Policy under *Boeing* is an example of a Category 2 rule which would warrant individualized scrutiny today and which, as such, given the evidence contained in the record, would be found to be lawful. *See* Memo GC 18-04. Specifically, there is no evidence in the record that the Policy ever caused employees to refrain from Section 7 activity, and there is evidence in the record that the Policy did not chill such activity—i.e., the Union representatives went public with the Petition by making strident comments for publication in the Newspaper, without concern for the Policy which had never been applied to an employee, much less to any union activity. Thus the impact of the Policy on Section 7 activities was zero and Respondent maintained the policy for valid and important business interests. Tr. 246-47, 343-44, 384-87, 391, 393-397.

B. Respondent was not shown to have committed any of the violations of Section 8(a)(1) or 8(a)(3) as alleged in the Amended Complaint.

Based on the findings of fact and conclusions of law supported above, and on the entire record, Respondent requests the ALJ to issue a Recommended Order that the Amended Complaint be dismissed.

Dated: September 13, 2018

Respectfully submitted, Maine Coast Regional Health Facilities, d/b/a Maine Coast Memorial Hospital, through its attorneys:

Frank T. McGuire, Esq.
fmcguire@rudmanwinchell.com

Joshua A. Randlett, Esq.
jrandlett@rudmanwinchell.com

**RUDMAN WINCHELL**
84 Harlow Street, P.O. Box 1401
Bangor, ME 04402-1401
(207) 947-4501

## STATEMENT OF SERVICE

I hereby certify that a copy of Respondent's *Closing Argument with Proposed Findings of Fact and Conclusions of Law* was electronically filed on September 14, 2018 via the Board's E-File system, and that copies were sent on the same date by United States certified mail, overnight delivery with return receipt requested, postage prepaid, to the following:

Paul J. Murphy, Acting Regional Director
National Labor Relations Board, Region 01
10 Causeway Street, 6th Floor
Boston, MA 02222-1001

Gene Switzer, Counsel for the General Counsel
National Labor Relations Board, Region 01
10 Causeway Street, 6th Floor
Boston, MA 02222-1001
(Additionally served by email via: Gene.Switzer@nlrb.gov)

Karen-Jo Young
35 Paul Bunyan Road
P.O. Box 87
Corea, ME 04642

Frank T. McGuire, Esq.
fmcguire@rudmanwinchell.com
**RUDMAN WINCHELL**
84 Harlow Street, P.O. Box 1401
Bangor, ME 04402-1401
(207) 947-4501
*Attorneys for Respondent MCMH*

B1 (Official Form 1) (04/13)

| United States Bankruptcy Court<br>District of Maine | Voluntary Petition |
|---|---|

| Name of Debtor (if individual, enter Last, First, Middle):<br>**Parkview Adventist Medical Center** | Name of Joint Debtor (Spouse) (Last, First, Middle): |
|---|---|
| All Other Names used by the Debtor in the last 8 years (include married, maiden, and trade names):<br>**See Schedule Attached** | All Other Names used by the Joint Debtor in the last 8 years (include married, maiden, and trade names): |
| Last four digits of Soc. Sec. or Individual-Taxpayer I.D. (ITIN) /Complete EIN (if more than one, state all): **01-0244035** | Last four digits of Soc. Sec. or Individual-Taxpayer I.D. (ITIN) /Complete EIN (if more than one, state all): |
| Street Address of Debtor (No. & Street, City, State & Zip Code):<br>**329 Maine Street**<br>**Brunswick, ME**<br>ZIPCODE **04011** | Street Address of Joint Debtor (No. & Street, City, State & Zip Code):<br>ZIPCODE |
| County of Residence or of the Principal Place of Business:<br>**Cumberland** | County of Residence or of the Principal Place of Business: |
| Mailing Address of Debtor (if different from street address)<br>ZIPCODE | Mailing Address of Joint Debtor (if different from street address):<br>ZIPCODE |
| Location of Principal Assets of Business Debtor (if different from street address above):<br>ZIPCODE | |

EXHIBIT tabbies A

**Type of Debtor** (Form of Organization) (Check one box.)

- ☐ Individual (includes Joint Debtors) *See Exhibit D on page 2 of this form.*
- ☑ Corporation (includes LLC and LLP)
- ☐ Partnership
- ☐ Other (If debtor is not one of the above entities, check this box and state type of entity below.)

**Chapter 15 Debtor**

Country of debtor's center of main interests:

Each country in which a foreign proceeding by, regarding, or against debtor is pending:

**Nature of Business** (Check one box.)

- ☑ Health Care Business
- ☐ Single Asset Real Estate as defined in 11 U.S.C. § 101(51B)
- ☐ Railroad
- ☐ Stockbroker
- ☐ Commodity Broker
- ☐ Clearing Bank
- ☐ Other

**Tax-Exempt Entity** (Check box, if applicable.)

- ☑ Debtor is a tax-exempt organization under Title 26 of the United States Code (the Internal Revenue Code).

**Chapter of Bankruptcy Code Under Which the Petition is Filed** (Check one box.)

- ☐ Chapter 7
- ☐ Chapter 9
- ☑ Chapter 11
- ☐ Chapter 12
- ☐ Chapter 13
- ☐ Chapter 15 Petition for Recognition of a Foreign Main Proceeding
- ☐ Chapter 15 Petition for Recognition of a Foreign Nonmain Proceeding

**Nature of Debts** (Check one box.)

- ☐ Debts are primarily consumer debts, defined in 11 U.S.C. § 101(8) as "incurred by an individual primarily for a personal, family, or household purpose."
- ☑ Debts are primarily business debts.

**Filing Fee** (Check one box)

- ☑ Full Filing Fee attached
- ☐ Filing Fee to be paid in installments (Applicable to individuals only). Must attach signed application for the court's consideration certifying that the debtor is unable to pay fee except in installments. Rule 1006(b). See Official Form 3A.
- ☐ Filing Fee waiver requested (Applicable to chapter 7 individuals only). Must attach signed application for the court's consideration. See Official Form 3B.

**Chapter 11 Debtors**

**Check one box:**

- ☐ Debtor is a small business debtor as defined in 11 U.S.C. § 101(51D).
- ☑ Debtor is not a small business debtor as defined in 11 U.S.C. § 101(51D).

**Check if:**

- ☐ Debtor's aggregate noncontingent liquidated debts (excluding debts owed to insiders or affiliates) are less than $2,490,925 *(amount subject to adjustment on 4/01/16 and every three years thereafter)*

**Check all applicable boxes:**

- ☐ A plan is being filed with this petition
- ☐ Acceptances of the plan were solicited prepetition from one or more classes of creditors, in accordance with 11 U.S.C. § 1126(b).

**Statistical/Administrative Information**

- ☑ Debtor estimates that funds will be available for distribution to unsecured creditors.
- ☐ Debtor estimates that, after any exempt property is excluded and administrative expenses paid, there will be no funds available for distribution to unsecured creditors.

THIS SPACE IS FOR COURT USE ONLY

Estimated Number of Creditors

| ☐ 1-49 | ☐ 50-99 | ☐ 100-199 | ☐ 200-999 | ☑ 1,000-5,000 | ☐ 5,001-10,000 | ☐ 10,001-25,000 | ☐ 25,001-50,000 | ☐ 50,001-100,000 | ☐ Over 100,000 |
|---|---|---|---|---|---|---|---|---|---|

Estimated Assets

| ☐ $0 to $50,000 | ☐ $50,001 to $100,000 | ☐ $100,001 to $500,000 | ☐ $500,001 to $1 million | ☐ $1,000,001 to $10 million | ☑ $10,000,001 to $50 million | ☐ $50,000,001 to $100 million | ☐ $100,000,001 to $500 million | ☐ $500,000,001 to $1 billion | ☐ More than $1 billion |
|---|---|---|---|---|---|---|---|---|---|

Estimated Liabilities

| ☐ $0 to $50,000 | ☐ $50,001 to $100,000 | ☐ $100,001 to $500,000 | ☐ $500,001 to $1 million | ☐ $1,000,001 to $10 million | ☑ $10,000,001 to $50 million | ☐ $50,000,001 to $100 million | ☐ $100,000,001 to $500 million | ☐ $500,000,001 to $1 billion | ☐ More than $1 billion |
|---|---|---|---|---|---|---|---|---|---|

| **Voluntary Petition** *(This page must be completed and filed in every case)* | Name of Debtor(s): **Parkview Adventist Medical Center** | |
|---|---|---|
| **All Prior Bankruptcy Case Filed Within Last 8 Years** (If more than two, attach additional sheet) | | |
| Location Where Filed: **None** | Case Number: | Date Filed: |
| Location Where Filed: | Case Number: | Date Filed: |
| **Pending Bankruptcy Case Filed by any Spouse, Partner or Affiliate of this Debtor** (If more than one, attach additional sheet) | | |
| Name of Debtor: **None** | Case Number: | Date Filed: |
| District: | Relationship: | Judge: |

**Exhibit A**

(To be completed if debtor is required to file periodic reports (e.g., forms 10K and 10Q) with the Securities and Exchange Commission pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 and is requesting relief under chapter 11.)

☐ Exhibit A is attached and made a part of this petition.

**Exhibit B**

(To be completed if debtor is an individual whose debts are primarily consumer debts.)

I, the attorney for the petitioner named in the foregoing petition, declare that I have informed the petitioner that [he or she] may proceed under chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under each such chapter. I further certify that I delivered to the debtor the notice required by 11 U.S.C. § 342(b).

X _____
Signature of Attorney for Debtor(s) Date

**Exhibit C**

Does the debtor own or have possession of any property that poses or is alleged to pose a threat of imminent and identifiable harm to public health or safety?

☐ Yes, and Exhibit C is attached and made a part of this petition.
☑ No

**Exhibit D**

(To be completed by every individual debtor. If a joint petition is filed, each spouse must complete and attach a separate Exhibit D.)

☐ Exhibit D completed and signed by the debtor is attached and made a part of this petition.

If this is a joint petition:

☐ Exhibit D also completed and signed by the joint debtor is attached a made a part of this petition.

**Information Regarding the Debtor - Venue**

(Check any applicable box.)

☑ Debtor has been domiciled or has had a residence, principal place of business, or principal assets in this District for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other District.

☐ There is a bankruptcy case concerning debtor's affiliate, general partner, or partnership pending in this District.

☐ Debtor is a debtor in a foreign proceeding and has its principal place of business or principal assets in the United States in this District, or has no principal place of business or assets in the United States but is a defendant in an action or proceeding [in a federal or state court] in this District, or the interests of the parties will be served in regard to the relief sought in this District.

**Certification by a Debtor Who Resides as a Tenant of Residential Property**

(Check all applicable boxes.)

☐ Landlord has a judgment against the debtor for possession of debtor's residence. (If box checked, complete the following.)

_____
(Name of landlord that obtained judgment)

_____
(Address of landlord)

☐ Debtor claims that under applicable nonbankruptcy law, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after the judgment for possession was entered, and

☐ Debtor has included in this petition the deposit with the court of any rent that would become due during the 30-day period after the filing of the petition.

☐ Debtor certifies that he/she has served the Landlord with this certification. (11 U.S.C. § 362(l)).

**Voluntary Petition**
*(This page must be completed and filed in every case)*

Name of Debtor(s):
**Parkview Adventist Medical Center**

## Signatures

### Signature(s) of Debtor(s) (Individual/Joint)

I declare under penalty of perjury that the information provided in this petition is true and correct.
[If petitioner is an individual whose debts are primarily consumer debts and has chosen to file under Chapter 7] I am aware that I may proceed under chapter 7, 11, 12 or 13 of title 11, United States Code, understand the relief available under each such chapter, and choose to proceed under chapter 7.
[If no attorney represents me and no bankruptcy petition preparer signs the petition] I have obtained and read the notice required by 11 U.S.C. § 342(b).
I request relief in accordance with the chapter of title 11, United States Code, specified in this petition.

X _____
Signature of Debtor

X _____
Signature of Joint Debtor

_____
Telephone Number (If not represented by attorney)

_____
Date

### Signature of a Foreign Representative

I declare under penalty of perjury that the information provided in this petition is true and correct, that I am the foreign representative of a debtor in a foreign proceeding, and that I am authorized to file this petition.
(Check only one box.)

☐ I request relief in accordance with chapter 15 of title 11, United States Code. Certified copies of the documents required by 11 U.S.C. § 1515 are attached.

☐ Pursuant to 11 U.S.C. § 1511, I request relief in accordance with the chapter of title 11 specified in this petition. A certified copy of the order granting recognition of the foreign main proceeding is attached.

X _____
Signature of Foreign Representative

_____
Printed Name of Foreign Representative

_____
Date

### Signature of Attorney*

X */s/ George J. Marcus*
Signature of Attorney for Debtor(s)

**George J. Marcus 1273**
**Marcus, Clegg & Mistretta, P.A.**
**One Canal Plaza; Suite 600**
**Portland, ME 04101**

**June 16, 2015**
Date

*In a case in which § 707(b)(4)(D) applies, this signature also constitutes a certification that the attorney has no knowledge after an inquiry that the information in the schedules is incorrect.

### Signature of Non-Attorney Petition Preparer

I declare under penalty of perjury that: 1) I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110; 2) I prepared this document for compensation and have provided the debtor with a copy of this document and the notices and information required under 11 U.S.C. §§ 110(b), 110(h) and 342(b); and 3) if rules or guidelines have been promulgated pursuant to 11 U.S.C. § 110(h) setting a maximum fee for services chargeable by bankruptcy petition preparers, I have given the debtor notice of the maximum amount before preparing any document for filing for a debtor or accepting any fee from the debtor, as required in that section. Official Form 19 is attached.

_____
Printed Name and title, if any, of Bankruptcy Petition Preparer

_____
Social Security Number (If the bankruptcy petition preparer is not an individual, state the Social Security number of the officer, principal, responsible person or partner of the bankruptcy petition preparer.) (Required by 11 U.S.C. § 110.)

_____
Address

_____

X _____
Signature

_____
Date

Signature of Bankruptcy Petition Preparer or officer, principal, responsible person, or partner whose social security number is provided above.

Names and Social-Security numbers of all other individuals who prepared or assisted in preparing this document unless the bankruptcy petition preparer is not an individual.

If more than one person prepared this document, attach additional sheets conforming to the appropriate official form for each person.

*A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both 11 U.S.C. § 110; 18 U.S.C. § 156.*

### Signature of Debtor (Corporation/Partnership)

I declare under penalty of perjury that the information provided in this petition is true and correct, and that I have been authorized to file this petition on behalf of the debtor.

The debtor requests relief in accordance with the chapter of title 11, United States Code, specified in this petition.

X */s/ Randee R. Reynolds*
Signature of Authorized Individual

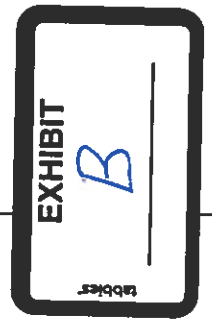
**Randee R. Reynolds**
Printed Name of Authorized Individual

**President**
Title of Authorized Individual

**June 16, 2015**
Date

Medicare.gov | Hospital Compare

The Official U.S. Government Site for Medicare




# Hospital Compare overall hospital rating

Questions about the Hospital Compare overall hospital rating can be submitted to: cmsstarratings@lantanagroup.com.

**What is the Hospital Compare overall hospital rating?**

The overall hospital rating summarizes up to 57 quality measures on Hospital Compare reflecting common conditions that hospitals treat, such as heart attacks or pneumonia. Hospitals may perform more complex services or procedures not reflected in the measures on Hospital Compare. The overall hospital rating shows how well each hospital performed, on average, compared to other hospitals in the U.S.

The overall hospital rating ranges from 1 to 5 stars. The more stars, the better a hospital performed on the available quality measures. The most common overall hospital rating is 3 stars. Learn moreabout hospital overall rating calculations.

**How can I use the Hospital Compare overall hospital rating?**

In an emergency, you should go to the nearest hospital. When you are able to plan ahead, the Hospital Compare overall hospital rating can provide a starting point for comparing a hospital to others locally and nationwide. Along with the overall hospital rating, Hospital Compare includes information on many important aspects of quality, such as rates of infection and complications and patients' experiences, based on survey results.

Choosing a hospital is a complex and personal decision that reflects individual needs and preferences. You should consider a variety of factors when choosing a hospital, such as physician guidance about your care plan and other sources of information about hospitals in your area.

Discuss the information you find on Hospital Compare with your physician or health care provider to decide which hospital best meets your health care needs.

**Where does the Hospital Compare overall hospital rating come from?**

Hospitals report data to the Centers for Medicare & Medicaid Services, the federal agency that runs the Medicare program, through the Hospital Inpatient Quality Reporting (IQR) Program and the Hospital

B-1

Outpatient Quality Reporting (OQR) Program. The Hospital Compare overall hospital rating includes up to 57 of these measures in the overall rating calculation. Learn more.

**Do the overall hospital rating and the measures on Hospital Compare include all patients treated at the hospital or just Medicare patients?**

Some of the measures used to calculate the overall hospital rating are based only on data from Medicare patients and some are based on data from all patients. The claims-based measures, which include the mortality, readmission, complications, PSI-90, and imaging efficiency measures, are calculated using Medicare fee-for-service (FFS) hospital claims data only. The process of care, healthcare-associated infection (HAI), and HCAHPS Survey measures include data from all payers.

**Why is the Hospital Compare overall hospital rating not displayed for some hospitals?**

This website displays an overall hospital rating for about 80% of hospitals on Hospital Compare. In order for Hospital Compare to display an overall hospital rating for a hospital, the hospital must have enough data on the individual quality measures used to calculate the overall rating. Some hospitals, due to the number and type of patients they treat, may not report data on all measures, and therefore, are not eligible for an overall hospital rating. For example, hospitals that are new or small may not have enough patients for the measures used to calculate an overall hospital rating.

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Medicare.gov | Hospital Compare

The Official U.S. Government Site for Medicare

# Hospital Compare overall hospital rating

The Hospital Compare overall hospital rating summarizes up to 57 quality measures across 7 areas of quality into a single star rating for each hospital. Once reporting thresholds are met, a hospital's overall hospital rating is calculated using only those measures for which data are available. This may include as few as 9 or as many as 57 measures. The average is about 39 measures. Hospitals report data to the Centers for Medicare & Medicaid Services through the Hospital Inpatient Quality Reporting (IQR) Program and the Hospital Outpatient Quality Reporting (OQR) Program. Star ratings are not calculated for Veterans Health Administration (VHA) hospitals.

The methodology uses a statistical model known as a *latent variable model*. Seven different latent variable models are used to calculate scores for 7 groups of measures.

1. Mortality
2. Safety of Care
3. Readmission
4. Patient Experience
5. Effectiveness of Care
6. Timeliness of Care
7. Efficient Use of Medical Imaging

A hospital summary score is then calculated by taking the weighted average of these group scores. If a hospital is missing a measure category or group, the weights are redistributed amongst the qualifying measure categories or groups.

Finally, the overall hospital rating is calculated using the hospital summary score.

Only hospitals that have at least 3 measures within at least 3 measure groups or categories, including one outcome group (mortality, safety, or readmission), are eligible for an overall hospital rating. Not all hospitals report all measures. Therefore, some hospitals may not be eligible for an overall rating.

The comprehensive methodology report provides additional detail on the methodology used to calculate the Hospital Compare overall hospital rating.

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## National distribution of overall hospital ratings

The following table shows the national distribution of the overall rating based on December 2017 results.

| Overall Rating | Number of Hospitals (N=4,579, %) |
|---|---|
| 5 stars | 337 (7.36%) |
| 4 stars | 1155 (25.22%) |
| 3 stars | 1187 (25.92%) |
| 2 stars | 753 (16.44%) |
| 1 star | 260 (5.68%) |
| N/A[2] | 887 (19.37%) |

## Additional information

The methodology for calculating the overall hospital ratings was developed with input from stakeholders and members of the public. Detailed information on the methodology is available on QualityNet.

Questions about the Hospital Compare overall hospital rating may be submitted to: cmsstarratings@lantanagroup.com.

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# Medicare.gov | Hospital Compare

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Print all results

## Hospital Results

**19 hospitals within 100 miles from the center of 04605.**

**Choose up to 3 hospitals to compare. So far you have none selected.**

Viewing **1 - 19** of **19** results

<< < > >>

| Hospital Information | Overall rating | Distance | Emergency Services | Hospital Type |
|---|---|---|---|---|
| MAINE COAST MEMORIAL HOSPITAL<br>50 UNION STREET<br>ELLSWORTH, ME 04605<br>(207) 667-5311<br>Add to My Favorites | 5 out of 5 stars | **19.8 Miles** | Yes | Acute Care Hospitals |
| ST JOSEPH HOSPITAL<br>360 BROADWAY<br>BANGOR, ME 04401<br>(207) 262-1000<br>Add to My Favorites | 3 out of 5 stars | **24.7 Miles** | Yes | Acute Care Hospitals |

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